

IN THE MISSOURI SUPREME COURT

CASE NO. SC86937

TERRI JO HEMME and TERRY HEMME,

Appellants

vs .

**SAM BHARTI, KUSUM BHARTI, BHARTI MIDWAY PROPERTIES, INC.,
AND R.J. REYNOLDS TOBACCO COMPANY,**

Respondents.

**APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSOURI
FIFTEENTH JUDICIAL CIRCUIT
DIVISION 15**

THE HONORABLE DENNIS A. ROLF

SUBSTITUTE BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This case involves an appeal from the grant of summary judgment to Defendants by the Circuit Court of Lafayette County, Missouri, based upon the trial court's application of the compulsory counterclaim provisions of Rule 55.32(a), and the doctrine of *res judicata*, to bar the Hemme's present claims. Following an opinion by the Missouri Court of Appeals, Western District, issued June 28, 2005, this action was transferred to the Missouri Supreme Court upon the motion and order of the majority of the participating judges pursuant to Rule 83.02 because of the general interest and importance of the question involved with the case and for the purpose of reexamining existing law. Therefore, jurisdiction of this appeal properly lies in this Court.

STATEMENT OF FACTS

Plaintiffs filed this action to recover damages against Defendants for personal injuries arising out of an automobile accident that occurred on or about February 6, 1998, in Lexington, Missouri. (L.F. 6-13). The accident involved two vehicles—one driven by Deborah Harrison and the other driven by Terri Jo Hemme—and resulted in both drivers sustaining injuries. (L.F. 6-13; 23-26). Ms. Harrison filed suit against Ms. Hemme for personal injuries Ms. Harrison suffered as a result of the accident, alleging Ms. Hemme negligently operated her vehicle. (L.F. 23-26). Ms. Harrison subsequently amended her petition to add the Bharti Defendants and R.J. Reynolds as defendants to the action, claiming the accident occurred as the direct result of impaired visibility caused by the placement of advertising placards by

Defendant R.J. Reynolds on property owned by the Bharti Defendants adjacent to the roadway (the “Harrison Lawsuit”). (L.F. 6-13).

In the prior Harrison Lawsuit, Terri Jo Hemme and Defendants were co-defendants to Ms. Harrison’s claims. Ms. Hemme and Defendants filed permissive cross-claims against one another in the Harrison Lawsuit for contribution and/or apportionment of fault for Ms. Harrison’s injuries. (L.F. 23-26). Ms. Hemme filed her permissive cross-claims against Defendants on May 22, 2002. (*Id.*) The most recent pronouncement of the law in Missouri governing compulsory counterclaims at that time was *Jacobs v. Corley*, 732 S.W.2d 910, 914 (Mo.App. 1987), which held that the filing of permissive cross-claims does not make co-parties “opposing parties” for purposes of triggering the compulsory counterclaim rule of Rule 55.32. Accordingly, Ms. Hemme did not assert any cross claims against Defendants relating to or arising out of her own separate injuries incurred in the accident, nor were those claims litigated or finally adjudicated in the Harrison Lawsuit. (L.F. 23-26). The Harrison Lawsuit was subsequently settled, and all of Ms. Harrison’s claims against Ms. Hemme and Defendants were dismissed with prejudice. (L.F. 23-26). Ms. Hemme and the Defendants did not release all claims that might exist between them arising out of the accident following settlement of the Harrison Lawsuit. (*Id.*)

On February 3, 2003, the Hemmes filed this action against Defendants for damages for personal injuries that Ms. Hemme suffered as a result of the February 6, 1998 accident and for loss of consortium damages suffered by Mr. Hemme. (L.F. 6-13). In response, in April, 2003,

Defendants filed separate motions for summary judgment, asserting that Rule 55.32(a), the compulsory counterclaim rule, and the doctrine of *res judicata* barred the Hemme's claims. (L.F. 23-46). The Hemmes filed their suggestions in opposition to Defendants' motions for summary judgment on September 19, 2003, relying on the holding in *Jacobs* (L.F. 45-54), and the trial court heard oral argument on September 23, 2003. (T.R. 1-16). On December 29, 2003, following additional briefing by the Bharti Defendants, the trial court granted summary judgment in favor of Defendants and dismissed the Hemme's claims with prejudice. (L.F. 66-69). Plaintiffs filed their Notice of Appeal on February 6, 2004. (L.F. 70-78).

On June 28, 2005, the Missouri Court of Appeals, Western District, issued its opinion affirming the grant of summary judgment on the basis that Rule 55.32(a) bars the Hemme's present claims because they were compulsory counterclaims that should have been asserted against Defendants in the prior Harrison Lawsuit. The Court of Appeals criticized the analysis and conclusions reached by the court in *Jacobs*, finding the contradictory holding by the same appellate court six years earlier in *Jones v. Corcoran*, 625 S.W.2d 173, 175 (Mo. App. 1981) was a correct application of the law relevant to the issues raised in this case. The Court of Appeals transferred the case to this Court on its own motion for reexamination of existing law on the application of Rule 55.32(a) in the context of permissive cross-claims. The Court of Appeals did not consider, or decide, the propriety of the trial court's grant of summary judgment based on application of the doctrine of *res judicata*.

POINTS RELIED ON

- I. The Trial Court Erred In Granting Summary Judgment For Defendants on the Hemme's Claims Because The Compulsory Counterclaim Rule Of Missouri Rule Of Civil Procedure 55.32(a) Should Not Apply, In That Terri Jo Hemme's Cross-Claims Against Defendants For Contribution And Indemnity In the Prior Action Were Permissive Cross-Claims, Which Did Not Make Her An Opposing Party To Defendants So As To Require the Assertion of All Related Claims Against Defendants In That Prior Action; and the Trial Court Erred in Granting Summary Judgment Because it Violated the Hemme's Due Process Rights to Assert Their Substantive Claims by Disregarding or Changing Existing Precedent Governing the Procedural Bar of the Compulsory Counterclaim Rule, In That It Is Fundamentally Unfair to Bar Substantive Claims of Parties Who Reasonably Relied on Existing Precedent That Did Not Require Them to Assert All Potential Cross-Claims in the Prior Action, And Any Change to Existing Precedent Should Have Prospective-Only Application.**

Jacobs v. Corley, 732 S.W.2d 910, 914 (Mo.App. 1987)

Rainbow Management Group, Ltd. v. Atlantis Submarines Hawaii, L.P.,

158 F.R.D 656, 660 (D. Hawaii 1994)

Jones v. Corcoran, 625 S.W.2d 173 (Mo.App. 1981)

Sumners v. Sumners, 701 S.W.2d 720, 723 (Mo. Banc 1985)

Missouri Rule of Civil Procedure 55.32(a) and (f)

II. The Trial Court Erred In Granting Summary Judgment For Defendants on the Hemme's Claims Because The Doctrine Of Res Judicata Does Not Apply To Bar the Hemme's Present Claims Against Defendants, In That Terri Jo Hemme's Cross-Claims Against Defendants For Contribution And Indemnity In the Prior Action Were Permissive Cross-Claims, Which Did Not Make Her An Opposing Party To Defendants So As To Require the Assertion of All Related Claims Against Defendants In That Prior Action, the Hemme's Claims Were Not The Subject Of The Harrison Lawsuit, And the Hemme's Present Claims Were Not Actually Litigated Or Decided In The Harrison Lawsuit

Jacobs v. Corley, 732 S.W.2d 910, 914 (Mo.App. 1987)

Brown v. Harrison, 637 S.W.2d 145, 147 (Mo.App. 1982)

Paramount Aviation Corp. v. Augusta, 178 F.3d 132, 146 n. 11 (3d Cir. 1996)

Gaddis v. Allison, 234 B.R. 805, 814 (D. Kan. 1999)

ARGUMENT

I. The Trial Court Erred In Granting Summary Judgment For Defendants on the Hemme's Claims Because The Compulsory Counterclaim Rule Of Missouri Rule Of Civil Procedure 55.32(a) Should Not Apply, In That Terri Jo Hemme's Cross-Claims Against Defendants For Contribution And Indemnity In the Prior Action Were Permissive Cross-Claims, Which Did Not Make Her An Opposing Party To Defendants So As To Require the Assertion of All Related Claims Against Defendants In That Prior Action; and the Trial Court Erred in Granting Summary Judgment Because it Violated the Hemme's Due Process Rights to Assert Their Substantive Claims by Disregarding or Changing Existing Precedent Governing the Procedural Bar of the Compulsory Counterclaim Rule, In That It Is Fundamentally Unfair to Bar Substantive Claims of Parties Who Reasonably Relied on Existing Precedent That Did Not Require Them to Assert All Potential Cross-Claims in the Prior Action, And Any Change to Existing Precedent Should Have Prospective-Only Application.

A. Standard of Review.

Appellate review of a trial court's grant of summary judgment is essentially *de novo* because the propriety of the court's action is purely an issue of law founded solely upon the record submitted and the applicable law. *Blunt v. Gillette*, 124 S.W.3d 502 (Mo.App.S.D. 2004), citing *ITT Commercial Fin. v. Mid-Am. Marine*, 854 S.W.2d 371, 380

(Mo.banc 1993). The appellate court need not defer to the trial court's decision because the propriety of summary judgment must be measured by the same criteria used by the trial court. *Id.* Summary judgment is appropriate where the moving party establishes that no genuine issue of material fact exists, and there is a right to judgment as a matter of law. *Id.* at 378.

B. Discussion.

The trial court held, and the Court of Appeals agreed, that because Terri Jo Hemme asserted permissive cross-claims for contribution and apportionment of fault against Defendants in the earlier Harrison Lawsuit, based upon Ms. Harrison's personal injury claims, the Hemmes were required at that time to bring all other claims against Defendants, including their separate personal injury claims. The trial court ignored the most recent interpretation and pronouncement of Missouri law as to the application of the compulsory counterclaim rule, upon which the Hemmes were entitled to rely in selectively bringing their permissive cross-claims, and found that the assertion of any such claims triggers application of the compulsory counterclaim rule of Rule 55.32(a).

The Hemmes face unfair and inequitable ouster of their claims, which stems at best from justified reliance on existing Missouri precedent that would clearly allow these claims to be prosecuted, regardless of whether they were asserted in the Harrison Lawsuit, and at worst from the confusion of the appellate courts as to the application of Missouri Rule of Civil Procedure 55.32(a) in the context of permissive cross-claims. As recognized by the lower courts in this case, Rule 55.32(a) is vague and ambiguous with respect to whether the filing of

permissive cross-claims triggers application of the compulsory counterclaim rule. At the time the Harrison Lawsuit was being litigated, the most recent case law applying Rule 55.32(a) in the context of permissive cross-claims, *Jacobs v. Corley*, 732 S.W.2d 910, 914 (Mo.App. 1987), clearly held that co-defendants did **not** become opposing parties upon the filing of permissive cross-claims so as to trigger application of the compulsory counterclaim rule. The Hemmes were entitled to rely on the law that existed at the time Ms. Hemme filed her permissive cross-claims for contribution and indemnity in the Harrison lawsuit.

The Court of Appeals has asked this Court to reexamine existing law, including *Jacobs*. As set forth below, the Hemmes believe that *Jacobs* is the better reasoned and appropriate decision concerning the context in which the compulsory counterclaim rule should apply. If, however, this Court chooses to reverse the existing precedent of *Jacobs*, such change in procedural law should have only prospective application so that the Hemmes, and others who reasonably relied upon *Jacobs* in choosing to selectively assert limited permissive cross-claims against co-defendants in one proceeding, will not lose due process rights to pursue their related claims in subsequent proceedings. By virtue of *Jacobs*, the Hemmes were not put on notice that they faced any risk of a potential bar to the assertion of their personal injury claims if not brought in the Harrison Lawsuit. Accordingly, the grant of summary judgment against the Hemmes should be reversed, and the Hemmes should be allowed to pursue their present claims against Defendants.

(1) **Rule 55.32(a) Should Not Apply to Ms. Hemme's Cross-Claims**

The compulsory counterclaim rule set forth in Missouri Rule of Civil Procedure 55.32(a) does not apply to bar the Hemme's present claims, and summary judgment granted on that basis was erroneous. Rule 55.32(a) provides in pertinent part:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against **any opposing party**, if it arises out of the same transaction or occurrence that is the subject matter of the **opposing party's** claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Id. (emphasis added).

Summary judgment against the Hemmes is premised upon a faulty assumption—that Ms. Hemme and Defendants were opposing parties in the Harrison Lawsuit. That is not the case, as unequivocally recognized by the Missouri Court of Appeals in *Jacobs v. Corley*, 732 S.W.2d at 914, which clearly supports the Hemme's ability to maintain their present claims. In *Jacobs*, Dean Witter Reynolds, Inc. filed an interpleader action against an attorney and his client to determine who was entitled to the cash proceeds of a settlement. Both the attorney and the client filed numerous cross-claims against each other, which were resolved in the interpleader action. *Id.* at 911. Subsequently, the attorney filed a separate action against his client for breach of the parties' contingent attorney fee contract and fraud, which claims had not been asserted as cross-claims in the first action. *Id.* at 911-12. The client filed a motion to dismiss

on the basis that the attorney was precluded under Rule 55.32(a) from litigating the issues in a separate action because he failed to raise them in the previous interpleader action. *Id.* at 911-12. The court granted the motion to dismiss. *Id.*

The Court of Appeals reversed the dismissal, holding the claims filed by the co-defendants in the previous interpleader action were permissive cross-claims and, therefore, the co-defendants were not compelled by Rule 55.32 (a) to bring all other claims against each other in the first action, even though their interests may have been adverse. The court reasoned, “co-defendants’ interests may well be adverse, in the case of joint tortfeasors, but that does not serve to transform them from co-parties into opposing parties under Rule 55.32(a) governing counterclaims.” *Id.* at 914. Relying on the federal counterpart to Rule 55.32(f), which contains identical language, the Court found that “a party who does not bring a cross-claim will **not** be barred by res judicata, waiver or estoppel from asserting it in a later action, as he would if the claim were a compulsory counterclaim.” *Id.*, citing Federal Rule of Civil Procedure 13(g) (emphasis added). The Court unequivocally concluded that the attorney had no duty to raise the breach of contract and fraud claims against the client in the first action because they were permissive cross-claims. *Id.* *Jacobs* was discussed and reaffirmed without limitation by the Court in *Scott v. State Farm Fire & Casualty Co.*, 947 S.W.2d 530 (Mo.App. 1997).

As in *Jacobs*, Ms. Hemme and Defendants were co-defendants against all of Ms. Harrison’s claims in the Harrison Lawsuit. In that capacity, Ms. Hemme and Defendants asserted non-substantive and contingent permissive cross-claims against one another for

apportionment of fault and contribution in connection with Ms. Harrison's claims. Cross-claims are governed by Missouri Rule of Civil Procedure 55.32 (f), which provides:

A pleading **may** state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim **may** include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

Id. (Emphasis added). As noted by the language of Rule 55.32(f) itself, cross-claims are permissive rather than compulsory. *See Brown v. Harrison*, 637 S.W.2d 145, 147-48 (Mo.App. 1982). "A cross-claim is one asserted against a co-party, whereas a counterclaim is brought against an opposing party." *Jacobs*, 732 S.W.2d at 914. "Co-parties are persons on the same side (i.e. all plaintiffs or all defendants) of the principal litigation. An opposing party is one who asserts a claim against the prospective counterclaimant in the first instance." *Id.*, citing *Augustin v. Mughal*, 521 F.2d 1215, 1216 (8th Cir. 1975).

Notwithstanding this unequivocal definition of "opposing parties," the trial court erroneously held that Ms. Hemme and Defendants became "opposing parties" when they filed permissive contribution cross-claims against each other in the Harrison Lawsuit. This ruling is directly contrary to existing Missouri precedent of *Jacobs*, as well as persuasive federal law

refusing to apply the similar federal compulsory counterclaim rule in the context of permissive cross-claims for contribution.

While such a broad interpretation of the compulsory claim rule to apply in the context of permissive cross-claims may serve as a means of bringing all logically related claims into a single litigation, it will not simplify or eliminate duplicitous litigation. Rather, such a rule will potentially turn even the simplest of cases into complex litigation and will place co-defendants in a untenable quandary: (1) either forego pursuit of permissive cross-claims for contribution and apportionment of fault against co-defendants for a plaintiff's injuries in the same action (thereby foregoing any opportunity to expedite litigation and reduce costs), or (2) be forced to litigate all related claims against each and every co-defendant in the underlying action, thereby creating confusion of issues and proof, increasing costs of litigation for all parties, and unfairly prejudicing the plaintiff in the underlying action by introduction of unrelated or tangential claims that detract from the plaintiff's claims.

The latter choice may also subject co-defendants with separate personal injury claims, especially in the context of insurance defense actions, to potential conflicts of interests between defense counsel retained by the defendant's insurer to defend against the plaintiff's claims, and personal injury counsel that will necessarily have to be retained by the defendant to pursue his or her separate personal injury claims against co-defendants. The result in this case is especially harsh, given that the state of the law at the time that Ms. Hemme filed her permissive cross-claims, as determined by *Jacobs*, failed to put co-defendants such as Ms.

Hemme on notice that her related, but separate personal injury claims must be brought along with her contribution and apportionment cross-claims or be forever barred.

(2) **Federal Courts Interpret Similar Federal Procedural Rules as Limiting the Compulsory Counterclaim Rule to Instances Where Substantive Cross-Claims, other than Contribution and Indemnity, Are Asserted.**

The principle established by *Jacobs*, that cross-claims such as contribution and indemnity are permissive, **and do not trigger the compulsory counterclaim rule of Rule 55.32(a)**, is consistent with federal cases interpreting the federal counterparts to the rules governing cross-claims and compulsory counterclaims, Federal Rule of Civil Procedure 13. Where the Missouri and federal rules are essentially the same, federal precedents constitute persuasive authority. *See Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W3d 528 (Mo. banc 2002). The majority of federal courts agree that co-defendants who file cross-claims for contribution and indemnity contingent upon the outcome of another claim, **without any “substantive” claims**, do not become opposing parties within the meaning of the compulsory counterclaim rule. *See Kirkcaldy v. Richmond County Board of Education*, 212 F.R.D. 289, 297-98 (M.D. N.C. 2002) (holding cross claim for indemnification and contribution does not provide a co-defendant with opposing party status needed pursuant to Rule 13 to assert a counterclaim); *Paramount Aviation Corp. v. Augusta*, 178 F.3d 132, 146 n. 11 (3d Cir. 1996) (“we suspect that a compulsory cross-claim rule would be limited to

situations in which the initial cross-claim included a substantive claim, as opposed to claims for contribution and indemnity, in order to avoid needless complication of litigation”); *Rainbow Management Group, Ltd. v. Atlantis Submarines Hawaii, L.P.*, 158 F.R.D 656, 660 (D. Hawaii 1994) (holding permissive cross-claims for contribution or indemnity “would not introduce new issues into the case, and could, in all likelihood, be litigated without substantially increasing the cost or complexity of litigation” and therefore do not trigger application of the compulsory counterclaim rule of Fed.R.Civ. P. 13(a)); *Answering Service, Inc. v. Egan*, 728 F.2d 1500, (D.D.C. 1984) (holding initial cross claim for indemnification by co-defendant was clearly permissive and “the mere bringing of that cross-claim did not, as far as the Rules are concerned, require [co-defendant] then to bring all other cross-claims it might have had. . . .”).

Rainbow Management rejected a proposed unlimited rule regarding the application of the compulsory counterclaim rule in the context of permissive cross-claims because “an unlimited rule may actually increase the amount or complexity of litigation” because “[a co-defendant] would be forced to file all additional claims against [another co-defendant] arising from the same transaction or occurrence underlying the initial cross-claim.” *Rainbow Management*, 158 F.R.D. at 660. *Kirkaldy* agreed, finding that *Rainbow Management’s* analysis of when parties become opposing parties “best furthers the purpose of the Federal Rules. . . .” *Kirkaldy*, 212 F.R.D. at 298. These cases underscore the propriety of the holding in *Jacobs* and should persuade this Court to adopt *Jacobs* as the appropriate statement of the

law as to the application of Rule 55.32(a) upon the filing of permissive cross-claims.

The Court of Appeals attempts to distinguish the federal cases cited above on the basis that under Missouri law, contribution claims are substantive in nature. (Opinion, pg. 12). However, examination of each of these federal cases, as well as the governing state law of each forum, demonstrates that no such distinction can be made. Under the *Erie* doctrine, in diversity cases, federal courts apply federal procedural rules and the forum state's substantive laws. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Commissioner of Internal Revenue v. Bosch's*, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967). In a diversity case, joint and several liability, like the substantive right to contribution, is determined as a substantive matter rather than a procedural one; state law is therefore applied under *Erie*. *Hayfield v. Home Depot USA, Inc.*, 168 F.Supp.2d 436, 451 (E.D. Penn. 2001); see also *Smith v. Whitmore*, *Fehlhaber v. Indian Trails*, 45 F.R.D. 285, 286 (D.Del. 1968) (right to contribution among joint tortfeasors in diversity action controlled by state law). As explained below, in each of the federal cases cited above, the state law of the jurisdiction in which the case was brought, which governs common law or statutory contribution claims, recognizes the right of contribution among joint tortfeasors as a substantive, independent claim. Therefore, the distinction made by the federal courts as to "substantive" cross-claims, and cross-claims for contribution and indemnity, for purposes of the compulsory counterclaim rule has nothing to do with whether contribution claims are considered to be substantive state law claims.

Kirkaldy was brought in federal court in the Middle District of North Carolina and involved harassment claims under Title VII, as well as state law claims for negligent supervision, hiring and retention. The key issue in that case was whether cross-claims for contribution and indemnity asserted by the plaintiff in a prior state court action were substantive so as to trigger application of the compulsory counterclaim rule. The court held such claims are not substantive. *Kirkaldy*, 212 F.R.D. at 298. Under North Carolina law, the right to bring a cross-claim for contribution between joint tortfeasors is substantive in nature. See *Great West Casualty Co. v. Fletcher*, 56 N.C.App. 247, 248, 287 S.E.2d 429, 430 (1982).

“... As a matter of substantive law, the principle of contribution is founded not upon contract but upon principles of equity and natural justice, which require that those who are under a common obligation or burden shall bear it in equal proportions and one party shall not be subject to bear more than his just share to the advantage of his co-obligor. ...” *Chase Federal Bank v. American Bankers Insurance Company of Florida, Inc.*, 1992 W.L. 55474 (E.D.N.C. 1992), quoting *Huggins v. Graves*, 337 F.2d 486, 489 (6th Cir. 1964); *Geiger v. Guilford College Community Volunteer Firemen’s Association*, 668 F.Supp. 492, 496-97 (M.D.N.C. 1987) (applying North Carolina substantive law governing contribution rights in diversity action).

Similarly, *Paramount* was a federal case removed from state court in New Jersey on diversity grounds, which involved prior litigation filed both in New Jersey and Pennsylvania. Under New Jersey law, contribution between tortfeasors is a substantive right. See *State of*

New Jersey v. Muskin Corporation, 125 N.J. 386, 402 593 A.2d 716 (1991) (recognizing how joint tortfeasors arrive at the litigation should not affect the substantive right of contribution). Likewise, contribution rights are also substantive under Pennsylvania law. *See Smith v. Whitmore*, 270 F.2d 741, 743-745 (3rd Cir. 1959) (applying Pennsylvania Uniform Contribution Among Joint Tortfeasors Act because it gives a substantive state law right of contribution); *Foulke v. Dugan*, 212 F.R.D. 265, 270 (E.D. Penn. 2002) (recognizing substantive right to contribution between joint tortfeasors under joint and several liability statute 42 Pa.C.S. §8322); *Hayfield*, 168 F.Supp.2d at 451 (holding right of contribution substantive under Pennsylvania law).

The same is true for the law of Hawaii (the forum state of *Rainbow Management*), which has a substantive statutory right of contribution between joint tortfeasors in defined circumstances. HRS §663-10.9 & 663-11(1993 & Supp. 1997). That substantive right may be enforced either through a cross-claim against a coparty, by motion for judgment of contribution in a single action, or, if these means cannot afford relief, by an independent action for contribution. *See Karasawa v. TIG Insurance Co.*, 88 Hawaii 77, 961 P.2d 1171, 1174-75 (1998). Thus, there is no distinction between the “non-substantive” cross-claims for contribution asserted by the parties in these federal cases and the same type of cross-claim asserted by Ms. Hemme against Defendants in the Harrison Lawsuit.

As in *Jacobs* and the cases cited above, Ms. Hemme’s cross-claims against Defendants for contribution and/or indemnity arising out of Harrison’s claimed injuries were not deemed

to be substantive within the context of the compulsory counterclaim rule. Unlike *Jones* and the cases relied on by Defendants, Ms. Hemme did not assert any claims for her own personal injuries in the Harrison Lawsuit. The only subject of the Harrison Lawsuit was Ms. Harrison's injuries, and the fault, if any, of the co-defendants for those injuries. Under the clear language of Rule 55.32(a) and (f), as well as the sound reasoning of *Jacobs* and the federal cases cited above, the mere filing of permissive contribution cross-claims did not turn Ms. Hemme and Defendants into opposing parties in the Harrison Lawsuit. Ms. Hemme was not required to assert her present claims against Defendants in the Harrison lawsuit, nor are the Hemmes now barred under Rule 55.32(a) from bringing these claims as a matter of law.

(3) **The Trial Court's Reliance on *Jones v. Corcoran* is Misplaced.**

The trial court erroneously adopted the holding of *Jones v. Corcoran*, 625 S.W.2d 173 (Mo.App. 1981), decided before *Jacobs*, to find that the filing of permissive cross-claims for contribution and apportionment of fault triggers the compulsory counterclaim rule. *Jones* involved a three-car accident. The plaintiff sued the two other drivers and their employers for wrongful death and personal injuries suffered in the accident. The co-defendants filed cross-claims for indemnity or apportionment of fault against one another. One co-defendant also asserted a separate cross-claim for the personal injuries he sustained in the accident. *Id.* at 174. The plaintiff moved to sever the substantive cross-claim, and the trial court granted the motion. In ruling on a writ of prohibition challenging the severance, the Court of Appeals, Southern District, determined that the personal injury cross-claim was a compulsory

counterclaim. *Id.*

Jones is factually inapposite to this case in that the sole question before the Court was the propriety of severance of **substantive cross-claims actually asserted against a co-defendant**, not the possible bar of such claims in subsequent litigation based on a failure to raise a cross-claim in the first instance. Unlike Ms. Hemme, the co-defendant in *Jones* actually asserted a substantive cross-claim against the other defendants for personal injuries. There was no discussion of the subsequent bar of that claim, or other unasserted cross-claims. Moreover, any discussion by the court of the application of Rule 55.32 was mere dicta, does not constitute the binding holding of the case, and is contrary to existing law as set forth above. Moreover, the holding of *Jones* was subsequently implicitly overturned, or rejected, by the very same court in *Jacobs*. The fact that the *Jacobs* court did not discuss *Jones v. Corcoran*, 625 S.W.2d 173 (Mo.App. 1981), decided six years earlier, supports the conclusion that the *Jacobs* court implicitly rejected its prior analysis to fall in line with the majority rule in federal courts, as stated above. Therefore, the reasoning and holding of *Jones* should be rejected, and this case remanded to allow the Hemmes to pursue their claims.

(4) **If the Court Changes Existing Law in Missouri to Apply Rule 55.32(a) to Permissive Cross-Claims for Indemnity and Contribution, Application of that New Law Should Be Applied Prospectively.**

As set forth above, this Court should reaffirm the holding of *Jacobs* that the filing of permissive cross-claims does not trigger application of the compulsory counterclaim rule. If however, this Court reverses *Jacobs* to now provide that Rule 55.32(a) applies when co-defendants file permissive cross-claims against one another, fundamental fairness requires such change in law to only be applied prospectively, so as to avoid unfair and inequitable bar of the Hemme's present claims in violation of their due process rights.

This Court has recognized two exceptions to the general rule that a change in the law by judicial decision is to be given retroactive effect. The first exception "is found when the change pertains to procedural as opposed to substantive law." *Sumners v. Sumners*, 701 S.W.2d 720, 723 (Mo. Banc 1985). Procedural decisions are to be given prospective effect only. *State v. Shafer*, 609 S.W.2d 153, 157 (Mo. banc 1980). "The distinction between substantive law and procedural law is that 'substantive law relates to rights and duties which give rise to a cause of action,' while procedural law 'is the machinery for carrying on the suit.'" *Sheperd v. Consumers Coop. Ass'n*, 384 S.W.2d 635, 640 (Mo. banc 1964), quoting *Barker v. St. Louis County*, 104 S.W.2d 371, 378 (1937). See also *Wilkes v. Mo. Highway and*

Transp. Comm’n, 762 S.W.2d 27, 28[1] (Mo. banc 1988). The compulsory counterclaim rule is not a substantive limitation on a right or cause of action. *Oates v. Safeco Ins. Co. of America* 583 S.W.2d 713 (Mo., 1979) (holding failure to assert compulsory counterclaim under Rule 55.32(a) is a procedural waiver, not a substantive provision, because the compulsory counterclaim rule creates a procedural bar only). Therefore, any decisional change in the application of the compulsory counterclaim rule in the context of the filing of permissive cross-claims should be given prospective-only effect.

To the extent that the application of the compulsory counterclaim rule in Missouri is deemed substantive, the Court’s change in such law should apply only prospectively so as to protect the Hemme’s from unfair and inequitable retroactive application of a new law to bar their claims. This second exception turns on the issue of fundamental fairness. A decision overruling a prior rule of substantive law is generally applied retroactively. *Sumners*, 701 S.W.2d at 722-23. However, “[I]f the parties have relied on the state of the decisional law as it existed prior to the change, courts may apply the law prospectively-only in order to avoid injustice and unfairness.” *Id.* The United States Supreme Court has found the practice of prospective-only application of decisions constitutional “whenever injustice or hardship will thereby be averted.” *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932).

“A Missouri Supreme Court decision overruling a prior rule of substantive law should be given prospective-only effect if the following three conditions are met: (1) if the decision

establishes a new principle of law by overruling clear past precedent; (2) if the purpose and effect of the newly announced rule will be retarded by retroactive application; and (3) if, after balancing the interests of those who may be affected by the change in law and weighing the degree to which parties may have relied upon the old rule and the hardship the parties might suffer from retroactive application of the new rule against the possible hardship to the parties who would be denied the benefit of the new rule, retrospective application would be unfair.” *Sumners*, 701 S.W.2d at 724. This Court has the authority to declare whether its decision will be retroactive or prospective “based on the merits of each individual case.” *Id.* at 723, quoting *Keltner v. Keltner*, 589 S.W.2d 235, 239 (Mo. banc 1979). “One of the most important factors considered by the court ‘in deciding whether and to what extent a judicially changed rule of law should be given retroactive effect’ is the degree to which the prior rule may have been justifiably relied on.” *Id.*

In applying the first *Sumners* factor to this case, the Missouri Court of Appeals recognizes that its decision effectively overrules prior binding precedent, *Jacobs*, which clearly held that the filing of permissive cross claims did not trigger the compulsory counterclaim rule of 55.32(a). Until now, *Jacobs* was the most recent pronouncement of the Missouri courts as to the interplay between Rule 55.32(a) and the filing of permissive cross-claims. Accordingly, application of the compulsory counterclaim rule to instances where co-defendants file permissive cross-claims for contribution and apportionment of fault effectively overrules *Jacobs* and establishes a new principle of law.

Retroactive application of the change in law to require co-defendants to bring all related cross-claims along with their cross-claims for contribution and apportionment of fault, or otherwise be barred, does not further the purpose of the new interpretation of the rule, which is to bring all related claims together in one lawsuit. In many instances, such as here, the prior litigation in which contribution cross-claims were asserted has already concluded by judgment or settlement, thereby preventing the co-defendants from asserting additional cross-claims against one another. The only effect of retrospective application of this new rule is to unfairly bar the substantive claims of parties who reasonably relied upon *Jacobs* in not asserting all potential cross-claims against co-defendants in prior litigation.

The third factor of the three-part fundamental fairness test announced in *Sumners* requires the Court to balance the interests of those who may be affected by the change in law. *Sumners*, 701 S.W.2d at 724. Specifically, the Court must consider the degree to which the parties may have relied on the old rule and weigh the hardships that could result from applying the new rule against the possible hardships to those parties who would be denied the benefit of the new rule. *Id.* Because the Hemmes, and other co-defendants in litigation in the State of Missouri, may have relied on the law as stated by *Jacobs* in deciding whether to file permissive cross-claims in prior litigation, and in choosing to limit such claims to contribution and apportionment of fault, fundamental fairness requires the change in law contemplated by the Court of Appeals, and considered here, not be applied to them to deprive them of due process in pursuing their personal injury claims. Retrospective application is particularly harsh where,

as here, co-defendants were not put on notice by *Jacobs* that other claims, not asserted along with cross-claims for contribution and apportionment, might be forever barred.

II. The Trial Court Erred In Granting Summary Judgment For Defendants On The Hemme's Claims Because The Doctrine Of Res Judicata Does Not Apply To Bar the Hemme's Present Claims Against Defendants, In That Terri Jo Hemme's Cross-Claims Against Defendants For Contribution And Indemnity In the Prior Action Were Permissive Cross-Claims, Which Did Not Make Her An Opposing Party To Defendants So As To Require the Assertion of All Related Claims Against Defendants In That Prior Action, the Hemme's Claims Were Not The Subject Of The Harrison Lawsuit, And the Hemme's Present Claims Were Not Actually Litigated Or Decided In The Harrison Lawsuit

A. Standard of Review.

Appellate review of a trial court's grant of summary judgment is essentially *de novo* because the propriety of the court's action is purely an issue of law founded solely upon the record submitted and the applicable law. *Blunt v. Gillette*, 124 S.W.3d 502 (Mo.App.S.D. 2004), citing *ITT Commercial Fin. v. Mid-Am. Marine*, 854 S.W.2d 371, 380 (Mo.banc 1993). The appellate court need not defer to the trial court's decision because the propriety of summary judgment must be measured by the same criteria used by the trial court. *Id.* Summary judgment is appropriate where the moving party establishes that no genuine issue of material fact exists, and there is a right to judgment as a matter of law. *Id.* at 378.

B. Discussion.

Defendants sought summary judgment against the Hemmes on two separate grounds: Rule 55.32(a) and the principles of *res judicata*. Because the trial court's order does not state upon which ground summary judgment was granted, the Hemmes address the impropriety and error of judgment on either ground. Defendants' *res judicata* arguments are based upon the same misconceptions and misapplication of the law as set forth above. Under Missouri law, the compulsory counterclaim rule is considered to be the codification of the principles of *res judicata* and collateral estoppel. *Joel Bianco Kawaski*, 81 S.W.3d at 532. Thus, the Hemme's arguments set forth above concerning Rule 55.32(a) are equally applicable here and demonstrate that summary judgment was not warranted and was erroneously entered.

Even if the principles of *res judicata* apply independently of the compulsory counterclaim rule, there is no bar to the Hemme's personal injury and loss of consortium claims in this action. The doctrine of *res judicata* generally precludes the same parties from relitigating the same claim. *Jacobs*, 732 S.W.2d at 913. Four elements must be present to establish *res judicata*: "(1) the identity of the thing sued for; (2) the identity of the cause of action; (3) the identity of the parties to the cause of action; and (4) the identity of the quality or capacity of the person for or against whom a claim is made." *Id.*, citing *Eugene Alper Construction Co., Inc. v. Joe Garavelli's*, 655 S.W.2d 132, 136 (Mo.App. 1983). "Generally, codefendants are not adversary parties for the purpose of *res judicata*, even though each believes the other was at fault in a negligence case." *Brown v. Harrison*, 637 S.W.2d 145, 147

(Mo.App. 1982) *quoting Harper v. Hunt* 247 So.2d 192 (La.App. 1971). Clearly, the doctrine of *res judicata* does not apply in this case.

It is undisputed that the Hemme's personal injury claims are separate and distinct from **Harrison's** personal injury claims, which was the subject of the Harrison Lawsuit. The cross-claims for contribution and indemnity asserted between Ms. Hemme and Defendants in the Harrison Lawsuit were related only to **Ms. Harrison's** injury claims, were contingent upon a finding of liability for **Ms. Harrison's** injuries, and involved simply a determination of the proportionate fault, if any, of Ms. Hemme and Defendants for Ms. Harrison's injuries. The Hemme's personal injury claims were not within the purview of the Harrison Lawsuit, nor were they contemplated by the parties as part of the Harrison Lawsuit. Thus, there is no identity of claims between the Harrison lawsuit and this action required to apply the doctrine of *res judicata* to bar the Hemme's present claims.

It is also undisputed that the Hemme's personal injury claims were not actually litigated, or adjudicated in the Harrison Lawsuit. The only claims litigated and determined through settlement in the Harrison Lawsuit were **Ms. Harrison's** personal injuries and the contribution cross-claims among the co-defendants for those injuries. Ms. Harrison's claims were settled and released. As co-defendants in the Harrison Lawsuit, Ms. Hemme and Defendants did not release all claims that existed or might exist against one another. There was no actual litigation or determination in the Harrison Lawsuit of the Hemme's personal injury claims, or of Defendants' liability for those injuries, which are separate and distinct from Ms. Harrison's

claims, so as to trigger any application of *res judicata*.

As set forth above, Ms. Hemme's filing of permissive cross-claims did not require the assertion of all other related claims that arose out of the same subject matter of the Harrison Lawsuit. Moreover, for purposes of *res judicata*, the Hemme's personal injury claims constitute a separate subject matter than Ms. Harrison's injuries, which were the subject of the Harrison Lawsuit. The only substantive claims in the Harrison Lawsuit were brought by Ms. Harrison for her own personal injuries. The Hemme's were not required to, and did not assert, any substantive claims against Defendants in the Harrison Lawsuit for their own injuries. Therefore, the subject matter of the Harrison Lawsuit was Ms. Harrison's injuries—not those suffered by the Hemmes. Consequently, the Hemme's personal injury claims were not a "point properly belonging to the subject matter of litigation" so as to trigger the bar of *res judicata* to those claims.

Missouri courts have specifically rejected the application of *res judicata* to bar substantive cross-claims not previously asserted in separate litigation between co-defendants. *See Jacobs*, 732 S.W.2d at 913-14 (holding "a party who does not bring a cross-claim will not be barred by *res judicata*, waiver or estoppel from asserting it in a later action...."). This argument has also been discounted by federal courts as essentially rearguing the question of whether a tort claim was compulsory in a prior lawsuit. *See Paramount*, 178 F.3d at 146 n.11; *Gaddis v. Allison*, 234 B.R. 805, 814 (D. Kan. 1999) (holding *res judicata* does not bar claim not asserted as cross-claim in prior litigation). Therefore, the trial court erred in granting

summary judgment to Defendants on the basis of either *res judicata* or the compulsory counterclaim rule of Rule 55.32(a), and the judgment should be reversed.

CONCLUSION

For the foregoing reasons, the Judgment of the Circuit Court dated December 29, 2003, entering summary judgment in favor of Defendants and against Plaintiffs and dismissing with prejudice all of Plaintiffs' claims against all Defendants, should be reversed.

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CERTIFICATE OF COMPLIANCE

I, Linda C. McFee, certify that the Brief of Appellant complies with the limitation of Supreme Court Rule 84.06(b)(1). There are 8,231 words in the brief. I further certify that the floppy disc submitted with this brief has been scanned for viruses and that it is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certified that two copies of the above and foregoing Brief of Appellant and one copy of the floppy disc filed with the Substitute Brief of Appellants were served by overnight mail, on this 15th day of July, 2005, to:

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APPENDIX

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